No. 43

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

LESTER J. ALBRECHT.
Petitioner,

vs.

THE HERALD COMPANY a Corporation, d/b/a
GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

BRIEF

In Opposition to Respondent's Motion to Dismiss.

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AUTHORITIES CITED.

No: 975.

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In Opposition to Respondent's Motion to Dismiss.

I.

Respondent has knowingly waived any right it may have had to challenge the jurisdiction of the Court on the ground that 15 U. S. C., Sec. 15, is unconstitutional because it authorizes a private person to prosecute an alleged criminal action depriving the defendant therein of its constitutional protections in a criminal action. Rule 24 (2) provides that a respondent may not move to dismiss a petition for certiorari, and that objections to the jurisdiction of the court should be asserted in his brief

in opposition. The matters raised by Respondent in its Motion to Dismiss are raised for the very first time in this case. While former Rule 7 (3), third paragraph, provided that after a writ of certiorari was granted a respondent might move to dismiss the writ for reasons not already advanced in opposition to the granting of the writ, the present Rules contain no such provision. In any event, such a motion as Respondent has filed would be available only when there are new or newly discovered facts which indicate that the writ should not have been granted. This is clearly not the case here. This is not a case of belatedly pointing out a clear and recognized constitutional obstacle to jurisdiction. It is instead an attempt to change a long recognized and accepted rule of constitutional law by resort to a contrived and tenuous argument.

The key to respondent's argument is that damages beyond actual compensation convert the civil suit by a private individual into a criminal action to vindicate the public interest by punishment. This Court, in the term just concluded, stated that "the Constitution presents no general bar to the assessment of punitive damages in a civil case," Curtis Publishing Co. v. Butts, ... U. S. ..., 87 S. Ct. 1975, 1994, citing Day v. Woodworth, 13 How. 363, 370-71, 14 L. Ed. 181. **Day** was decided in the December Term, 1851. At that early date the Court said that "repeated judicial decisions for more than a century" left no doubt, despite the questions raised by some writers, that punitive damages could be granted in a civil case. *Ibid.*, at p. 271. The statute in the patent laws providing for the court to increase up to three-fold the actual damages found by a jury was on the books at the time, and the Court said:

> By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages,

inflicted by way of penalty or punishment, given to the party injured. *Ibid.*, at p. 371.

If a rule of constitutional law established for well over a hundred years and reaffirmed by this Court only last month is to be overturned it should not be on a motion to dismiss a grant of certiorari. Neither should it be raised in any other way in this proceeding. Petitioner-Plaintiff, a former home-delivery newspaper carrier deprived of his livelihood by the actions that are the subject of this suit, is ill-matched in financial resources against the large newspaper corporation that as Respondent-Defendant, now seeks to introduce at the last minute a constitutional bar to liability for its admitted actions.

However, if the Court finds that the constitutional claim raises a jurisdictional issue that must be decided in this case, Petitioner-Plaintiff strongly prefers to have the issue decided on this motion, as remand for trial of this issue would be oppressive to him.

II.

Respondent is not entitled to prevail on the merits in this motion. Logic may protect the granting of damages for punishment in a civil action. But the experience of the law has often been to accomplish desired ends by reasonable means at the expense of logical purity.

At common law punitive or exemplary damages have always been recoverable in a civil action. Until modern times this was true because the jury's determination of the amount of damages was as final and arbitrary as its decision on the facts. Sedgwick, Damages, 9th ed., § 349. After development of the principle that in general damages are compensatory, punitive damages could still be recovered in a civil action but they were limited to

certain kinds of cases. *Ibid.*, § 350; McCormick, Damages, § 77.

This court held more than a hundred years ago, and again last month, that the constitution is not a general bar to recovery of punitive damages in a civil action. **Day v. Woodworth**, *supra*; **Curtis Publishing Co. v. Butts**, *supra*. It specifically recognized legislative authority to provide new rights to recover punitive damages in civil actions when it upheld an Alabama statute creating employer liability for deaths caused by an employee's negligence. **Pizitz Co. v. Yeldell**, 274 U. S. 112, 47 S. Ct. 509, 71 L. Ed. 952.

It is true that in the recent libel cases the constitutionality of punitive damages was assumed by all parties, so that the Court's reaffirmance does not rest on full reexamination based on full briefs and arguments. However, full examination of punitive damages in civil cases was recently undertaken by the House of Lords on the basis of briefs and extensive arguments. **Rooke v. Barnard** [1964], A. C. 1129 (H. L.). The case was brought by a draftsman dismissed by B. O. A. C. because of the threat of fellow workers to strike in breach of an agreement, unless he was fired. The dismissed employee sued the union members who made the strike threat for the tort of intimidation and recovered £7,500 on a direction that deliberate illegality might be punished by exemplary damages. The Court of Appeals reversed on the ground that a threat to break a contract could not give rise to the tort of intimidation. The case went to the House of Lords on cross appeals, where it was a case of first impression on the exemplary damages issue. On this issue Lord Devlin spoke for all their lordships. After reviewing all the cases cited and argued, he said:

> These authorities convince me of two things. First, that your Lordships could not, without complete dis-

> regard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognize the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. *Ibid.*, at pp. 1225-1226.

Lord Devlin then set out 3 categories in which exemplary damages were approved. These were (1) oppressive, arbitrary or unconstitutional action by a governmental officer; (2) action calculated to make a profit for the defendant in excess of compensation payable to the plaintiff, and (3) express authorization by statute.

Abuses of the principle of exemplary damages can be avoided by constitutional limitations on certain types of liability, as in libel cases against public officials or public figures. **New York Times Co. v. Sullivan**, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686; **Rosenblatt v. Baer**, 383 U. S. 75, 86 S. Ct. 669, 15 L. Ed. 597; **Time, Inc. v. Hill**, 385 U. S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456; **Curtis Publishing Co. v. Butts**, supra.

The distinction is easily made between the civil case in which punitive damages are awarded to a private litigant and a criminal action. It turns on the right asserted, rather than the remedy applied. This test is used by the federal courts for removal purposes. "A suit brought by and for the sole benefit of an individual to recover a penalty or damages, including punitive, is civil in nature, although recovery may help the state in vindicating its public policy." Moore's Fed. Prac. 2d ed., Par. 0.157 [4.-2]. This Court has stated that Congress recognized the different interests of the public and of injured persons and provided a variety of actions against anti-

trust violators so that each interest could be protected by appropriate proceedings, including criminal or civil suits by the Government, and private suits for injunctions or treble damages. In reversing a District Court refusal to grant the Government an injunction against an antitrust violator already under a decree in a private action covering the same actions, this Court said:

> "The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive. S. Rep. No. 698, 63d Cong., 2d Sess. 42; cf. **Federal Trade Comm'n v. Cement Institute**, 333 U. S. 683, 694—695 (1948). '. . . [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.' **United States v. Bendix Home Appliances**, 10 F. R. D. 73, 77 (S. D. N. Y. 1949)."
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> **United States v. Borden Co.**, 347 U. S. 514, 518-519, 74 S. Ct. 703, 98 L. Ed. 903.

This Court has also held that the antitrust laws protect individuals against injuries resulting from acts prohibited by the antitrust laws even if the public interest in competitive prices and practices is in no way harmed. **Klor's, Inc. v. Broadway-Hale Stores, Inc.**, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741; **Radiant Burners, Inc. v. Peoples Gas Co.**, 364 U. S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358; **Simpson v. Union Oil Company of California**, 377 U. S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98. In these situa-

tions it is absolutely clear that in seeking treble-damages plaintiff is acting to vindicate his own interests and cannot possibly be said to be suing "in the right of the United States for the violation of a criminal statute." (Respondent's Motion, p. 5.)

Respondent contends on page 5 of its Motion that this Court considered "only passingly" the issue of the legality of compensatory damages in **Chattanooga Foundry and Pipe Works, et al. v. City of Atlanta,** 203 U. S. 390, 27 S. Ct. 65. Suffice it to say that this Court considered the issue sufficiently to make plain that the entire foundation on which Respondent rests its argument for the granting of its Motion to Dismiss is completely without substance. The cited case was a suit to recover treble damages for a violation of the antitrust Act (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3202), and this Court held that a statute of limitations for any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise" does not apply to the treble damages provision of the anti-trust act. Similarly, Respondent's entire argument that 15 U. S. C. 15 is unconstitutional because it imposes "punishment for the commission of a federal crime in the mold of a civil action," thus violating Article II and various provisions of the Bill of Rights, must fall for each of a valid premise. Respondent's contentions clearly lack merit.

CONCLUSION.

Respondent waived any right to raise a constitutional defense to this action by not raising it in time. The Federal Rules do not permit Respondent to raise such issue at this time or in the manner attempted. Respondent's motion is not meritorious. It rests on the premise that a punitive remedy makes any action a criminal one to vindicate the public right. This is not the case. Punitive damages in civil cases have long been provided

by common law and by statute, serve a proper purpose in modern law in general, and in particular the treble-damage provision of the antitrust laws is directed to vindicating distinct, identifiable, private interests. The motion to dismiss should be denied.

Respectfully submitted,

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I, Donald S. Siegel, co-counsel for the Petitioner herein, and attorney of record for Petitioner in the Courts below, state that on the 25th day of July, 1967, I served two copies of the foregoing Brief in Opposition to Motion to Dismiss on the Respondent as required by Rule 33, by personally mailing said copies hereof to Messrs. Hocker, Goodwin & MacGreevy, Attorneys of Record for the Respondents, in care of their office, 411 North Seventh Street, St. Louis, Missouri 63101.

Donald S. Siegel,
Member of the Bar of the United States Supreme Court.